been acted upon. To say that they can now sell under that order or the order of 1928 by applying to the Registrar would override one of the principal provisions of section 149, namely, that the chargor is to have an opportunity to show cause against the sale before the order fixing the time and place of sale is made by the Court. Parties cannot by consent give one another a liberty to apply otherwise than in accordance with the law.

What the chargees in this case seem to me to desire is to proceed as if they were executing a decree, and yet refuse to give the chargors the opportunity to show cause against sale which they would have if the order were a decree, or which they have if the application is made under section 149.

There has been much argument before the Registrar and before me as to whether the order of 1928 is a decree. Mr. Rintoul, for the chargors, submits that the order made on the first application in 1928 is a decree and that section 264 of the Civil Procedure Code applies. His argument is founded upon the fact that these applications are made at present on an originating summons, and that as accounts are usually taken, the proceeding is a suit and the order is a decree. Mr. Mills submitted that the order made in 1928 is not a decree, that the sale had been postponed by order of the Court with liberty to the chargees to apply and therefore he was right in applying by Summons in Chambers before the Assistant Registrar to give directions for the sale: a sale previously ordered by the Court upon a default in 1928.

The order is not a decree. The proceeding is not a suit. No decisions have to be taken as to whether the applicant has a charge or whether he has a power of sale, so there is no adjudication upon any substantive issue and therefore no judgment and no decree. I would describe the proceeding under section 149 as an application for the execution of a power of sale.

I have dealt with the matter so far as one of first impression. There are, however, two cases—*Chettiappah Chetty v. Raja Abdul Rashid*[1] and *Murugappa Chettiar v. Letchumanan Chettiar*[2] which both decide that a proceeding under section 149 is not a suit.

For these reasons I think the Assistant Registrar was right in refusing to give directions.

The appeal is dismissed with costs. The chargees should, in my opinion, proceed by applying by an originating summons calling upon the chargors to show cause.

Appeal dismissed with costs.

[APPELLATE CIVIL JURISDICTION]

POYSER, C.J.

April 8, 1940.

S. SEETHAINAYAGEE AMMAL v. M.R.M. RAMASAMY CHETTIAR.

The Land Code (Cap. 138)—Chargee's application for sale—Part heard before one Collector—Hearing continued before another—Legality.

On a chargee's application for sale, the chargee gave evidence and was cross-examined for two days before one Collector of Land Revenue. The hearing was continued before another Collector, who made an order for sale. The evidence of the chargee, upon which the case depended, was challenged.

Held, that in the absence of any statutory provision, it is at least irregular, if not unlawful, for a Judge to continue the hearing of a case which has been part-heard by another Judge; and particularly so where there is a conflict of evidence.

Cases referred to:—

(1) *British Reinforced Concrete Engineering Co. Ltd., In re application of,* 45 T.L.R. 186.

(2) *Coleshill v. Manchester Corporation,* (1928) 1 K.B. 776.

APPEAL FROM COLLECTOR OF LAND REVENUE.

W. G. W. Hastings for appellant.

J. T. Tosswill for respondent.

Poyser, C.J.—This is an appeal against a decision of the Collector of Land Revenue, Kuala Lumpur, ordering that certain lands, registered in the appellant's name and charged to the respondent, be sold. At the conclusion of the arguments, I allowed the appeal, but stated that I would give my reasons for so doing in a written judgment.

The first ground of appeal was as follows:—

> "That the Collector who gave judgment in the case had no power to give a decision, as part of the evidence had been heard by another Collector and the evidence given before the first Collector was not heard by the Collector who gave the decision".

The application for the order for sale first came before Raja Uda bin Raja Muhammad, the then Collector of Land Revenue, on the 21st of October, 1938, the chargee then gave evidence and was cross-examined. The hearing was continued on the 28th of October, and the cross-examination was then concluded. The next hearing took place on the 5th of October, 1939,

before another Collector, the chargor and other witnesses gave evidence and, on the 7th of October, judgment was reserved. The chargee was not recalled on either of these days, but it appears from the record that a copy of the notes of his evidence was produced.

Mr. Hastings, who appeared for the appellant, pointed out that the evidence of the chargee was of the utmost importance, as the principal question for adjudication was a question of fact, viz.: whether the consideration for the charge was $3,000 or only $960 as alleged by the chargor. Mr. Hastings also pointed out that although under section 261 of the Criminal Procedure Code a Magistrate may act on evidence recorded by his predecessor, and under section 208 of the Civil Procedure Code a Judge, other than a Judge of the Supreme Court, might similarly act, yet there was no provision in the Land Code enabling a Collector to adopt such procedure.

In the absence of any statutory provision, it is at least irregular, if not unlawful, for a Judge to continue the hearing of a case which has been part-heard by another Judge, and particularly so where there is, as in this case, a conflict of evidence. In the case of *Coleshill v. Manchester Corporation*[2], Scrutton, L.J., stated in the course of his judgment (pages 785 and 786):—

> "This case was heard under melancholy circumstances. Mr. Justice Fraser, who began the case on Thursday, July 7th, and had heard three of the plaintiff's witnesses, was taken ill during the night and died on the Friday. Mr. Justice Acton was sent down from London on the Sunday and, having read Thursday's short hand notes, at the urgent request of the parties, continued the case with the same jury on Monday the 11th, the Thursday's witnesses not being recalled. I can understand that in the unprecedented and painful circumstances it is unnecessary to take any objection to what happened, but I think it is a precedent which should not be followed in future. I doubt whether a Judge has any jurisdiction to continue the hearing of a case in which witnesses have been called in Court in the course of the trial before the jury and another Judge, it not being a case of evidence being taken on commission or before an examiner".

These observations were considered in a later case before the Railway and Canal Commission, viz.: *In re Application of British Reinforced Concrete Engineering Co., Ltd.*[1]. In that case, the head-note is as follows:—

> "Where during proceedings without a jury, after some of the witnesses have been called, the presiding Judge dies, another Judge, if there is no conflict of evidence, may at the request of the parties preside at the continuation of the hearing, after reading the short-hand notes of the evidence, and need not have the witnesses recalled";

and MacKinnon, J., stated that the dictum of Scrutton, L.J., above referred to was directed to a case heard before a jury where there was a conflict of evidence. He could see no objection in this case to the procedure proposed by the parties.

Mr. Toswill argued that the Land Code intended to lay down a simple and informal procedure, that no objection was taken to another Collector continuing the hearing of this application, and that if it was not unreasonable in the Magistrate's Courts for a similar procedure to be adopted, it was *a fortiori* not unreasonable for a Collector of Land Revenue to adopt such procedure.

The Criminal Procedure Code, however, does recognise that the recording of evidence by two Magistrates may lead to the prejudice of an accused person. Section 261 (b) is as follows:—

> "The Court of a Judge may, whether there be an appeal or not, set aside any conviction had or commitment made on evidence not wholly recorded by the Magistrate before whom the conviction was had or the commitment made, if such Court is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial".

In this case if the evidence of the chargee had been unquestioned and admittedly accurate, there would have been considerable substance in Mr. Toswill's contention, but as his evidence was alleged to be, to put it mildly, inaccurate (he was cross-examined for two days), and the whole case depends on the accuracy or otherwise of such evidence, only one Collector of Land Revenue should, in my opinion, have adjudicated on this application.

For the above reasons I allowed the appeal with costs, such costs to be set off against such amount as may be found to be due to the chargee, and directed that the application be referred back for hearing "*de novo*" before another Collector of Land Revenue.

Appeal allowed with costs. Application referred back for hearing "de novo" before another Collector.

[ORIGINAL CIVIL JURISDICTION]

HORNE, J.

March 1, 1940.

RAMASAMY v. MUNIAPPAN.

[RAUB CIVIL SUIT]

Contract Enactment (Cap. 52), Secs. 23 and 24—Societies Enactment (Cap. 96), Sec. 10—Illegal purpose—Kutu (Chit Fund)—Money lent to meet liability thereunder.

In a suit on a promissory note for $400.00, the defendant alleged that the consideration consisted of, **inter alia**, (a) a sum of $130.00 drawn by the plaintiff